

**IN THE
SUPREME COURT OF MISSOURI**

SC92541

U.S. DEPARTMENT OF VETERANS AFFAIRS,

Appellant,

v.

**KARLA OGRODNIK BORESI,
DIVISION OF WORKERS' COMPENSATION,**

Respondent.

**Appeal from the Circuit Court of St. Louis, Missouri
The Honorable Mark H. Neill, Judge**

SUBSTITUTE BRIEF OF RESPONDENT

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ARGUMENT

The Appellant U.S. Department of Veterans Affairs (“VA”) correctly observes that the standard of review for the denial of a writ of mandamus is abuse of discretion. Appellant’s Substitute brief (“App. Sub. Br.”) at 8.

This Court has explained the limited availability of a writ of mandamus – and thus the limited circumstances in which denial of such a discretionary writ can constitute an abuse of discretion:

The writ of mandamus is issued “to compel the performance of a ministerial duty that one charged with the duty has refused to perform.” *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 165-66 (Mo. banc 2006) (citing *State ex rel. Phillip v. Public School Retirement System*, 364 Mo. 395, 262 S.W.2d 569, 574 (1953)). “A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed.” *Id.* at 166. And that in order for a circuit court to grant mandamus against a public official – and thus for an appellate court to overrule the denial of such a writ – the duty of the public official must be clear and unequivocal. *Id.*

State ex rel. Office of Public Counsel v. Public Service Com'n of State, 236 S.W.3d 632, 635 (Mo. banc 2007).

The questions before this Court, then, are whether Administrative Law Judge Karla Boresi had a “clear and unequivocal duty” to grant the VA’s motion to intervene, and whether the circuit court thus abused its discretion by declining to order Judge Boresi to do so. This Court should affirm the circuit court’s denial of the petition because, based on the submissions made to both the circuit court and to Judge Boresi, she did not have a “clear and unequivocal” obligation to permit the VA to intervene based on the VA’s motion, and it was not an abuse of discretion for the circuit court to deny the VA’s petition for a writ of mandamus.

The VA relies on 38 U.S.C. § 1729(a)(1). That section does not specifically address workers’ compensation cases, but it is written broadly and presumably applies to such cases. It authorizes the VA to “to recover or collect reasonable charges for such care or services ... from a third party,” but only “to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care or services had not been furnished by a department or agency of the United States.” *Id.*

At some points in this litigation the VA suggested it could appear at the Commission on its own behalf as a “provider of the care or services.” But

before the Court of Appeals, Eastern District, the VA conceded that Judge Boresi was not obligated – indeed, not even authorized – to allow the VA to intervene as a “provider of care or services ... eligible to receive payment”:

Under Missouri law, a private provider of unauthorized medical care does not have a right to participate as a party in a workers’ compensation case. Standing in those shoes ..., [the VA] admittedly does not either.

Appellant’s Brief to the Eastern District at 9. The VA does not make a “provider” claim here.

Instead, the VA relies solely on its ability to step into the shoes of the veteran – the employee or claimant – Mr. Hollis. Whether the circuit court erred, then, must be judged according to whether the VA at least alleged to Judge Boresi that circumstances existed under which Mr. Hollis would have a right to receive payment for the care provided by the VA.

Employees like Mr. Hollis do not have a right to simply choose their own providers and insist that their employers pay the bill. It is “the employer’s right to provide medical treatment of its choice” – a “right [that] is waived when the employer fails to provide necessary medical treatment after receiving notice of an injury.” *Shores v. General Motors Corp.*, 842 S.W.2d 929, 931 (Mo. App. E.D. 1992) (overruled on other grounds by *Hampton v. Big*

Boy Steel Erection, 121 S.W.3d 220, 222–23 (Mo. banc 2003)). “Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the [claimant] may make his own selection and have the cost assessed against the employer.” *Wiedower v. ACF Indus., Inc.*, 657 S.W.2d 71, 74 (Mo. App. E.D. 1983). Again, it is only when “the employer is on notice that the employee needs treatment and fails or refuses to provide it [that] the employee may select his or her own medical provider and hold the employer liable for the costs thereof.” *Martin v. Town and Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. S.D. 2007), quoted with approval, *Reed v. Associated Elec. Co-op., Inc.*, 302 S.W.3d 693, 700 (Mo. App. S.D. 2009). If Mr. Hollis went to the VA for treatment by his own choice, his treatment was “at his own expense.” § 287.140.1, RSMo Supp. 2011.

In neither the petition for writ of mandamus filed in the circuit court nor in the motion to intervene filed with Judge Boresi did the VA allege that Mr. Hollis’ employer was on notice, nor that his employer failed or refused to provide treatment. All that the VA alleged to the circuit court was that (1) Mr. Hollis was employed; (2) he was injured on the job and required treatment; and (3) the VA provided that treatment. LF at 3. The VA alleged nothing about the employer at all. In fact, in the suggestions in support of the petition the VA said nothing to the circuit court about appearing in the shoes of Mr. Hollis rather than seeking payment as a “provider of care or

services.” *See* LF 5-7. That was consistent with what little the VA said in its motion to intervene. LF at 9-10. Given the concession that providers cannot themselves enter Commission proceedings, it is hardly surprising that Judge Boresi declined to allow provider VA to appear and the circuit court decided not to require her to reverse her decision.

On the record before this Court, before the circuit court, and before Judge Boresi, there is simply no basis on which to conclude that Mr. Hollis had a claim for payment of the costs of care provided by the VA. And if Mr. Hollis did not have a claim, then neither would the VA, despite § 1729(a)(1)). Thus, neither Judge Boresi, in denying the motion, nor the circuit court, in denying the petition, abused their discretion.

The VA argues otherwise, of course, in three ways.

The first is to simply refer repeatedly to the broad language of the statute and the impact of federal law through the supremacy clause. But that begs the question of whether Mr. Hollis had a claim to recover the cost of VA treatment. Because if he did not, the VA could not recover pursuant to § 1729(a)(1)).

The second is to ask the Court to second-guess Judge Boresi’s alleged failure to read between the lines of the VA’s motion. The VA says that the sketchy facts in the motion put Judge Boresi “on notice” (App. Sub. Br. at 16) that the VA claimed that Mr. Hollis could recover the costs of his VA

treatment, and presumably “on notice” that the basis for doing so the refusal of the employer to provide care. But the VA cites no law from mandamus cases suggesting that there is a clear duty of any judge, administrative or Article V, to fill in blanks as to critical elements of a claim.

The third is to decry the VA’s lack of knowledge. It may be true (or then again it may not; we do not know what ability the VA has to obtain information from Mr. Hollis) that the VA does not know and has no immediate means of ascertaining whether Mr. Hollis’s employer refused treatment – the prerequisite for Mr. Hollis and thus for the VA’s medical expense claims. But nothing in the Missouri workers’ compensation law nor in § 1729(a)(1)) says that the VA has a right to appear in order to ascertain whether it has a right to appear. If federal law does not give the VA the ability to find the facts prerequisite to invoking § 1729(a)(1)), that is neither Judge Boresi’s nor the Missouri courts’ problem.

Moreover, the VA seems to concede that it *does* have the ability to get the information it needs – albeit in the course of an alternative means of recovering its expenses. In fact, part 4 of the VA brief is all about that alternative. It may come later and be more complex, but it proves that Congress did not leave the VA without an effective remedy, even where the VA lacked the information necessary to step into a pending state administrative proceeding.

Ultimately, the omission of a necessary fact from the motion may be “a technicality,” as the VA claims. App. Sub. Br. at 15. But “a technicality” is sufficient to explain why it is not an abuse of discretion for a circuit court to deny a petition for a discretionary writ.

CONCLUSION

For the reasons stated above, the judgment of the circuit court should be affirmed and the petition for writ of mandamus denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed and served electronically via Missouri CaseNet, on this 13th day of August, 2012, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b) and (c)

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 1,716 words.

/s/ James R. Layton

James R. Layton
Solicitor General